Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

NYNEX REPLY COMMENTS

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TABLE OF CONTENTS

SUMMARY

Several parties (ALTS, MCI, NCTA) confuse the purposes of Sections 259 (Infrastructure Sharing) and 251 (Interconnection) of the Communications Act. Section 259, while consistent with the overall pro-competitive goals of the Telecommunications Act of 1996 (the Act), is not designed to open up local exchange markets to competition (that is Section 251's purpose); nor to give qualifying carriers especially favorable terms and conditions beyond a Section 251 "baseline"; nor to effect competitive parity between qualifying carriers and competitive local exchange carriers (CLECs).

Section 259 was narrowly drawn by Congress to enable non-competing qualifying carriers (QLECs) lacking economies of scale or scope -- generally perceived to embrace small, rural independent telephone companies (ITCs) -- to obtain network infrastructure capabilities from other incumbent LECs (ILECs) to help support QLEC services in those QLECs' universal service areas. As such, Section 259 is mutually exclusive of, and complementary to Section 251. The hallmarks of Section 259 are cooperation and harmony between co-carriers, advancement of universal service objectives and dissemination to American consumers of the benefits that can be derived from modern network infrastructure.

Consistent with the deregulatory intent of the Act, and Congress' specific intent underlying Section 259, the Commission should implement that section by largely relying on the negotiation process among parties. For example, there is no basis for Section 259

pricing rules as have been promulgated to implement Section 251. At most, the FCC should issue broad guidelines tracking specific provisions of Section 259. The FCC could always intervene as needed in a specific infrastructure sharing matter, e.g., through the informal consultation, declaratory ruling or Section 208 complaint processes.

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NYNEX REPLY COMMENTS

The NYNEX Telephone Companies[1] (NYNEX) submit these Reply Comments to parties' comments filed December 20, 1996, in the above-captioned matter.

I. CERTAIN COMMENTORS CONFUSE THE PUBLIC POLICY GOALS OF SECTIONS 259 AND 251

Several parties confuse the purposes of Sections 259 (Infrastructure Sharing) and 251 (Interconnection) of the Communications Act, and seek to define those purposes to serve their own narrow objectives. ALTS asserts that Section 259 does not contemplate non-competing arrangements but is a logical extension of the pro-competitive policies established in the Telecommunications Act of 1996 (the Act).[2] MCI states that Section 259 is intended to confer upon qualifying carriers especially favorable terms and conditions beyond the "baseline" of Section 251 to enable the benefits of competition to

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[1] New England Telephone and Telegraph Company and New York Telephone Company.

[2] ALTS 1-2. ALTS suggests (p. 3) that "infrastructure services" provided pursuant to Section 259 also be made available for any purpose pursuant to Section 251.

be carried over to the qualifying carrier's area.[3] NCTA urges the Commission to construe Section 259 to promote competitive parity between qualifying carriers and competitive local exchange carriers (CLECs).[4] These parties' positions are wrong and in conflict with policies Congress intended to be advanced.

NYNEX has shown that Section 259, while consistent with the overall pro-competitive goals of the Act, is not designed for the purpose of opening up local exchange markets to competition.[5] That is the purpose of Section 251, a separate and distinct section. Section 259 was narrowly drawn by Congress to enable non-competing qualifying carriers (QLECs) lacking economics of scale or scope -- generally perceived to embrace small, rural independent telephone companies (ITCs) -- to obtain network infrastructure capabilities from other incumbent LECs (ILECs) to help support QLEC services in those QLECs' universal service areas. As such, Section 259 is mutually exclusive of, and complementary to Section 251. The hallmarks of Section 259 are cooperation and harmony between co-carriers, advancement of universal service objectives and dissemination to American consumers of the benefits that can be derived from modern communications infrastructure. As Frontier emphasizes, unlike the environment under Section 251 of stimulating intense local exchange competition, Section 259 qualifying carriers may obtain advanced network capabilities "pursuant to

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3 MCI i.

4 NCTA i, 7.

5 See NYNEX 3-11.

infrastructure sharing agreements *for use in serving their own customers*."[6] As U S WEST points out (pp. 3-4), the FCC should establish an atmosphere conducive to cooperative negotiations by parties to share infrastructure.

In dealing with the parties' contentions regarding various aspects of Section 259 (infra), the Commission should keep in proper perspective the narrow and unique focus of that section (as compared to Section 251).

II. SEVERAL PARTIES PROPOSE UNSOUND AND OVERLY PRESCRIPTIVE RULES TO IMPLEMENT THE ACT'S INFRASTRUCTURE SHARING PROVISIONS

A. Non-Competing Use Of Infrastructure

ALTS makes the astounding proposition that qualifying carriers should be permitted to use Section 259 infrastructure for any purpose including to compete with the providing LEC (PLEC).[7] For its part, MCI maintains there should not be an "absolute prohibition on using incumbent LEC facilities obtained initially under a Section 259 agreement to compete against the incumbent LEC...."[8] The Commission should reject these parties' arguments which would essentially read Section 259(b)(6) out of the Act. Section 259(b)(6) explicitly provides that the FCC regulations:

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6 See Frontier 4-5. See also AT&T, RTC, Sprint. Notably, MCI concedes that (p. 4) "[s]ection 251 contemplates competition between the Incumbent LEC and the requesting/interconnecting carrier." See also Castleberry Tel. Co. et. al 4 ("The primary intent of this section [251] is to promote competition in the local exchange market....")

7 ALTS 1, 4.

8 MCI 10.

> ... shall ... not require a local exchange carrier to which this section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area ....

As U S WEST correctly points out (p. 4), "... a carrier sharing infrastructure under Section 259 has the express statutory right to demand that the qualifying carrier not use the shared infrastructure in competition with the providing carrier."

NYNEX believes that where a qualifying carrier desires to use ILEC infrastructure to compete with that ILEC, Section 259 is simply not applicable -- rather, the Section 251 process must be utilized. In this regard, ALTS misses the mark in arguing that carriers must not be permitted to agree not to compete and that there is no such category as non-competing carriers.[9] ALTS states that (p. 4) Section 259 does not prohibit qualifying carriers from competing with the provisioning incumbent. This latter statement is generally true since such competition can and should take place, but under Section 251, not 259.[10] Section 259 only provides that the QLEC cannot use infrastructure obtained under that section to compete with the PLEC. But this is simply and properly Congress' determination that in the narrow context of Section 259, cooperative (not competitive) relationships between carriers to share infrastructure will best serve the public interest.

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[9] ALTS 3-5.

[10] See NYNEX 10.

MCI expresses concern that a PLEC could abrogate the terms of the Section 259 agreement simply by choosing to compete against the qualifying carrier.[11] However, the Commission should leave this area (as well as other Section 259 implementation issues -- see infra) to the negotiation process between PLECs and QLECs.[12] Contrary to ALTS (p. 6), the Commission need not and should not police this area, since it can appropriately rely on the negotiation process.

NCTA contends that Section 259 should be narrowly construed so as not to thwart competition: i.e., a qualifying carrier must show the requested infrastructure capabilities cannot be obtained under Section 251; and where it obtains such capabilities under Section 259, the qualifying carrier must make those capabilities available to CLECs competing within its market pursuant to Section 251.[13] NCTA's position is meritless. Since Section 259 is independent of Section 251, it makes no sense that a qualifying carrier must first resort to Section 251 before it can utilize Section 259.[14] Moreover, the Commission's regulations implementing Section 259 should respect the policy underlying subsection (b)(6) (discussed earlier) to foster cooperation among co-carriers to serve the broader public interest, as opposed to self-interested competitive motivations that could

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[11] MCI 10.

[12] See U S WEST 6, 10-11 ("... the Commission must ensure that incumbent LECs can easily terminate contracts when competition arises.")

[13] NCTA i, 5-6.

[14] See also USTA 23 ("Unbundled network elements that may be used to provide services on a competitive basis are ... available under Section 251.")

inhibit infrastructure sharing efforts. In NYNEX's view, a CLEC could use Section 251 to obtain from a QLEC (also an ILEC)[15] interconnection, unbundled network elements and/or telecommunications services at wholesale rates for resale, in order to compete with that QLEC in the QLEC's local exchange area. Where those capabilities obtained under Section 251 benefit from or utilize infrastructure obtained by the QLEC from a PLEC under Section 259, however, the CLEC should not be permitted to use those capabilities to compete with the PLEC. As USTA points out, this limitation is necessary to preserve the policies of Section 259(b)(6) from being undermined by a "loophole."[16] Accordingly, the FCC should permit PLEC infrastructure sharing agreements to effectively safeguard those policies.[17] This will also be in keeping with the requirements in Section 259 that PLECs be protected from having to take steps that are "economically unreasonable" or "contrary to the public interest,"[18] and that the FCC shall "establish conditions that promote cooperation between local exchange carriers to which this section applies and qualifying carriers."[19]

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15 See NYNEX 19-20.

16 See USTA 16-17. See also ALLTEL 4-5 (The PLEC should not be required to permit QLEC resale of services using infrastructure, and the FCC must not allow "gam[ing]" of infrastructure sharing provisions); GTE ii, 19; RTC 12.

17 See U S WEST 6, 10-11.

18 Section 259(b)(1).

19 Section 259(b)(5).

B. Pricing

In line with its position that Section 251 provides a "baseline" for Section 259 terms and conditions, MCI recommends that the Commission require prices for Section 259 facilities to be less than or equal to the Commission's interim proxy prices for unbundled network elements, minus an average amount of common costs and a normal rate of return.[20] Further, MCI urges that TELRIC pricing, adjusted for exclusion of profits and common costs, become the permanent rate ceiling for Section 259 facilities.[21] ALTS also argues for the use of Section 251 pricing standards where the qualifying carrier desires to use Section 259 infrastructure outside its universal service territory.[22] Here again, the FCC should reject these commentors' positions since they are diametrically opposed to how Congress intended Section 259 to operate. Sections 259 and 251 are distinct and different, yet these parties would improperly treat Section 259 as coextensive with Section 251.

Congress intended pricing of infrastructure furnished under Section 259 to be a matter of negotiation between the parties. (See also infra.) Thus, for example, Section 259(b)(3) explicitly provides that a PLEC cannot be compelled by the FCC or State to make infrastructure sharing a common carrier offering.[23] Moreover, as GTE points out,

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[20] MCI i, 9.

[21] MCI 9.

[22] ALTS 1, 4.

[23] See NYNEX 13-15.

the Section 252 pricing standards referred to in Section 251 are totally inapplicable to Section 259.[24] As RTC aptly indicates, "[t]o surrender the design of this section [259] to the Commission's rules on interconnection, which are intended for a completely different purpose -- *i.e.* the development of competition -- would flout the intent of Congress."[25] Accordingly, it should not be assumed that prices negotiated under Section 259 would be less than or equal to TELRIC, or for that matter bear any necessary relation to pricing under Sections 251-252.

C. Negotiation Process/FCC Guidelines

The record provides compelling support for the Commission to adopt its tentative conclusions (NPRM ¶ 7) that:

> ... the best way for the Commission to implement Section 259, overall, is to articulate general rules and guidelines. We believe that Section 259-derived arrangements should be largely the product of negotiations among parties.[26]

There are many benefits of this approach, including carrying through on the deregulatory intent of the Act;[27] accommodating evolving future technologies and unforeseen circumstances; and allowing for infrastructure agreements to be flexible

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[24] See GTE 9.

[25] RTC 2. See also SWBT ii, 12-13. Even when a request is submitted under Section 251, the parties can negotiate without regard to the terms of that section. See Section 252(a)(1).

[26] See Ameritech 3; BellSouth 2; Castleberry Tel. Co. et. al i, 3-4; GTE 1-2; Minn. Indep. Coal. 2; Ore. PUC 2; Pac. Tel. ii, 4-5; SWBT ii, 11-12; USTA iii, 18.

[27] See NPRM ¶ 2.

enough so parties can effectively and efficiently tailor provisions to individual needs in a cooperative fashion. In short, the FCC should avoid "micro-managing"[28] this area with stringent, prescriptive rules. At most, the FCC should issue general or "minimalist"[29] guidelines tracking specific provisions of Section 259. As stated by Castleberry Tel. Co. et. al. (p. i), "... reducing governmental involvement is key to success."

D. Scope Of Infrastructure Sharing; Economic Reasonableness

Again in this context, MCI contends that Section 251 requirements should serve as the "lower-bound" standard by which qualifying carriers may gain access to ILEC infrastructure, facilities and services under Section 259.[30] MCI's contention should be rejected. Unlike Section 251, the plain language in Section 259 says nothing about PLECs having to make "services" available, and places no common carrier obligations upon PLECs.[31] Moreover, given the narrow and distinct nature of Section 259 as compared to Section 251 (see supra), the Commission need not and should not issue prescriptive rules on the nature of Section 259(a) "public switched network infrastructure, technology, information, and telecommunications facilities and functions," much less interpret those terms as equivalent to Section 251 requirements. This area should be left to the negotiation process.[32]

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[28] See Pac. Tel. ii.

[29] See U S WEST 3.

[30] MCI 4, 8. See also NCTA i.

[31] See also SWBT i, 3-5; USTA iii, 4-5, 23.

[32] See NYNEX 12-16. See also Frontier 2.

MCI further maintains that a qualifying carrier under Section 259 should be able to obtain facilities the ILEC has not built so long as the ILEC is compensated for the additional costs plus a reasonable profit.[33] There is no clear reasoning behind MCI's suggestion, and certainly no basis for the Commission to consider such a rule. Section 259(a) speaks of a PLEC "mak[ing] available" infrastructure, suggesting the PLEC's provisioning obligation relates to sharing of existing capabilities. As ALLTEL indicates (p. 4), "... a qualifying carrier must take the providing carrier's network the way it finds it."[34] In any case, this area is best left to the negotiation process, subject to possible FCC intervention (e.g., informal consultation, declaratory ruling request or Section 208 complaint) as necessary in a specific matter relative to interpreting Section 259 standards of economic reasonableness, public interest, etc. This also comports with the non-common carrier nature of a PLEC's Section 259 provisioning obligations.[35]

E. Section 259(c) Telecommunications Information Disclosure

With foolish consistency, MCI recommends that the Commission incorporate Section 251(c)(5) requirements on public notice of network changes into rules implementing Section 259(c) requirements on telecommunications information disclosure by PLECs.[36] MCI's recommendation is baseless. Unlike other subsections of Section

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[33] MCI 7. See also RTC ii.

[34] See also USTA 15.

[35] See Section 259(b)(3).

[36] MCI 13-14.

259, Section 259(c) does not require the Commission to promulgate any regulations. Moreover, Section 259(c) is quite different from Section 251(c)(5); e.g., disclosure under Section 259(c) is non-public in nature, being limited to parties to the infrastructure sharing agreement.[37] In any event, information disclosed under Section 251(c)(5) will be in the public domain, and thus available to all, including Section 259 qualifying carriers to the extent relevant in the Section 259 context.

F. Qualifying Carrier Definition

Among other definitional requirements, a Section 259 qualifying carrier must lack economies of scale or scope.[38] Notwithstanding certain commentors' assertions,[39] the FCC should permit such economies to be determined up to the holding company level.[40] This is necessary to avoid a loophole by which the intent of Congress would likely be frustrated. Clearly, a QLEC can enjoy economies of scale or scope by virtue of its dealings with affiliates in regard to the procurement process, scientific research and development, etc. If such affiliate relationships were to be ignored, QLECs could game the system by, for example, being configured as stripped down LECs receiving substantial support and economies from affiliates, but still being qualified to leverage off PLEC economies of scale or scope through infrastructure sharing agreements. This

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37 See NYNEX 16-17.

38 See Section 259(d).

39 E.g., GTE 2; RTC iii, 19-20.

40 See NYNEX 17-18. See also AT&T 4.

would be inconsistent with the universal service-related intention of Section 259 to extend network infrastructure to carriers lacking access to such capabilities.

Finally, the Commission should reject MCI's suggestion that the Commission apply a pricing test by which a carrier could qualify for Section 259 infrastructure sharing by showing it could offer services at a lower price given access to an ILEC's infrastructure.[41] MCI's proposed test is overly complicated, contrary to the deregulatory intent of the Act and not related to the Act's requirements. As the Minnesota Independent Coalition points out (pp. 11-12), determining project costs will be extremely difficult, and carriers will not necessarily lack economies of scale or scope even if a particular project could be provided at a lower cost through infrastructure sharing with an ILEC. The FCC should interpret the Section 259(d) definition of qualifying carrier in a way that primarily embraces small, rural ILECs,[42] and defer to parties' negotiation process subject to FCC regulatory intervention if warranted in a specific case.

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[41] See MCI 16.

[42] See NYNEX 17-20. See also AT&T 3-4; ALLTEL 3; Castleberry Tel. Co. et. al i, 1-3; Frontier 3; Minn. Indep. Coal. 2, 10; NCTA 3; RTC iii, 19; USTA iv, 12.

III. CONCLUSION

Contrary to certain parties' contentions, the FCC should effect Congress' intent by interpreting Section 259 infrastructure sharing requirements as narrow and distinct from Section 251, and by adopting (at most) broad guidelines tracking specific provisions of Section 259.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing NYNEX REPLY COMMENTS in CC Docket No. 96-237 were served on each of the parties listed below this 3rd day of January 1997, by first class United States mail, postage prepaid, or by hand, where indicated.

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